87-1741

NO._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

GERALD CORBELL, ET AL.,
Petitioners,

v.

KEVIN LEE STEVENS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

WILIAM C. ZAPALAC*
Assistant Attorney General

GABRIEL G. QUINTANILLA
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

Counsel of Record

QUESTION PRESENTED

I. WHETHER QUALIFIED IMMUNITY UNDER *HARLOW V. FITZGERALD* BARS FURTHER LITIGATION AGAINST GOVERNMENT OFFICIALS WHO HAVE BEEN VINDICATED IN A TRIAL WITHOUT REVERSIBLE ERROR?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Attorney General of Texas, on behalf of Gerald Corbell, Jesse Wilburn, and Hal Wyatt, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A., *infra*. la-15a) is reported at 832 F.2d 884 (5th Cir. 1987). The prior opinion of the court of appeals granting petitioners' motion for a stay of district court proceedings (App. *infra*. 16a-17a) is reported at 798 F.2d 120 (5th Cir. 1986). The initial opinion of the

district court granting respondent's motion for new trial (App. C., *infra*, 18a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered November 25, 1987. A petition for rehearing *en banc* was denied on January 22, 1988 (App. D., *infra*, 27a). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Title 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. Title 28 U.S.C. §2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

4. Section 39.02, Texas Penal Code, which provides, in pertinent part, as follows:

> (a) A public servant acting under color of his office or employment commits an offense if he:
>
> > (1) intentionally subjects another to mistreatment...that he knows is unlawful; or
> >
> > (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, ...or immunity, knowing his conduct is unlawful.
>
> (b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes

advantage of such actual or purported capacity.

STATEMENT OF THE CASE

Respondent filed suit under 42 U.S.C. §1983 against Petitioner Corbell for excessive use of force and against Petitioners Wilburn and Wyatt for failure to protect Respondent from Petitioner Corbell. The case was tried to a jury for four days. The jury rendered a verdict for Petitioners. Respondent filed a motion for a new trial, complaining that the intent requirements in the jury charge were erroneous. The district court granted Respondent's motion, concluding that jury instruction number 36 improperly instructed the jury that it was necessary for the Respondent to prove the subjective intent of the Petitioners (App., *infra*. 19a-27a). The instruction read:

> 36. Section 39.02 of the Texas Penal Code sets out the circumstances under which state officials transgress their authority under state law. The court finds this statute to comport with the Constitution of the United States. It provides, in part, as follows:
>
> > (a) A public servant acting under color of his office or employment commits an offense if he:
> >
> > > (1) intentionally subjects another to mistreatment ... that he knows is unlawful; or
> >
> > > (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, ...or immunity,

> knowing his conduct is unlawful.
>
> (b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(App. E. *infra*, 37a, 38a).

Petitioners submitted a motion to vacate the order granting a new trial or, in the alternative, to appeal pursuant to 28 U.S.C. §1292(b) and for a stay of district court proceedings pending the appeal. The district court denied this motion. Petitioners next filed in the district court a notice of appeal to the Fifth Circuit Court of Appeals, and filed in the Fifth Circuit an emergency motion for stay of the district court proceedings pending the appeal.

In applying for the stay, Petitioners argued that jury findings vindicating their actions on March 4, 1984, rendered them immune from further litigation under *Mitchell v. Forsyth*. 472 U.S. 511 (1985). A majority of the three-judge motion's panel agreed when it stayed district court proceedings: ". . .[I]f the jury findings stated are valid, these defendants are immune.," (App. B. at 17a).

After concluding that *Mitchell v. Forsyth* requires appellate scrutiny into the order granting a new trial, the panel explained how *Mitchell* applied in this case.

> This case has already once been tried, resulting in the stated jury finding, now set aside by the court on the ground that it gave the jury an incorrect legal instruction

> on intent. The defendants are entitled to appeal as of right from that action of the court, without being required to stand trial again before their appeal is terminated.

(App. B. at 17a).

After briefing and oral argument, the panel considering the merits of Petitioners, appeal ruled that appellate jurisdiction under *Mitchell* did not provide for plenary review of the district court's order:

> [S]ince our jurisdiction over this appeal is based on the collateral order doctrine, as made applicable by *Mitchell* to issues of law involving entitlement to qualified immunity, we will examine the district court's instructions for legal error only. (citation omitted). We do not consider it appropriate in this specialized kind of appeal to consider whether in the overall factual context of this particular case, any error in those instructions was sufficiently prejudicial to warrant a new trial.

(App. A. at 7a).

In affirming the district court's order, the court emphasized the narrow review being given:

> We conclude that the district court's instructions were legally erroneous. . . .Therefore, on the basis of our review of the instructions *for legal error only*, we affirm the district court's order granting Stevens a new trial.

(App. A. at 14a, 15a).

The two circuit panels reached conflicting decisions on how the petitioners' entitlement to qualified immunity applied. The panel granting the stay correctly focused on the fact that the petitioners spent four days in trial and were vindicated by a jury. Thus, the jury findings themselves render the petitioners immune from further litigation if the charge correctly set forth the law (App. B. at 17a). The panel deciding the merits of the appeal did not consider this in examining the qualified immunity issue:

> The police officers have argued, and the motion panel held, that the new trial order implicates the issue of their entitlement to qualified immunity (footnote omitted). We think, however, that the district court's basis for granting the new trial goes more to the substantive elements the plaintiff must prove in his section 1983 claims. None of the interrogatories submitted to the jury dealt with qualified immunity. Although one part of the court's jury charge did describe the qualified immunity defense, that instruction is not the basis upon the basis of which a new trial was granted.

(App. A. at 6a).

In the decision that we now seek to have reviewed, the court of appeals declined to review whether any reversible error occurred in the trial where government officials successfully defended their actions. The court of appeals specifically withheld appellate scrutiny of this breadth until *after* a second trial against the police officers. Thus, the court of appeals declined to consider whether any alleged deficiency in the jury instructions used in the vindication of the officials was harmless in light of the entire charge.

A petition for rehearing and suggestion for rehearing *en banc* was denied on January 22, 1988.

REASONS FOR GRANTING THE WRIT

This case presents important and unsettled questions concerning the substantive law of qualified immunity and conflicting courts of appeals, decisions construing the procedural accommodation of its principles.

1). The court of appeals held that plenary appellate scrutiny under *Mitchell v. Forsyth* does not extend to public officials who have successfully defended their actions in trial. The court of appeals ruled that in the context of government officials who have been vindicated in trial, no appellate review exists to consider whether any alleged defect in the proceedings is reversible until after the official has been subjected to another trial (App. A. at 14a). Implicit in the court of appeals' decision is the collateral order doctrine does not allow appellate courts to review whether alleged defects in trial proceedings concerning government officials constitute reversible error.

This failure to incorporate the harmless error doctrine into appeals brought pursuant to *Mitchell v. Forsyth* is inimical both to the doctrine of qualified immunity as well as to fundamental precepts of appellate review. First, the court of appeals' construction of the collateral order doctrine nullifies the harmless error doctrine under 28 U.S.C. §2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. (Emphasis added.)

The court of appeals' nullification of the harmless error doctrine is at odds with legions of cases where the doctrine has been applied to alleged defects in jury instructions. *See First Virginia Bankshares v. Benson*. 559 F.2d 1307 (5th Cir. 1977), *reh. denied*. 564 F.2d 416, *cert. denied*, *Walter E. Heller & Co. v. First Virginia Bankshares*, 435 U.S. 952 (1978) (For reviewing a trial court's instructions to a jury, court of appeals considers the challenged instruction as part of the entire charge, in view of the allegations of the complaint, the evidence presented, and the arguments of counsel, to determine whether the jury was misled and whether the jury understood the issues); *in accord*, *Houston v. Herring*, 562 F.2d 347 (5th Cir. 1977) (In reviewing trial court's instructions to jury, they must be considered as whole, and there is no harmful error if charge in general correctly instructs, even if one portion is technically incorrect, but erroneous instructions are not cured by correct instructions in other portions of charge when charge leaves reviewing court with substantial and ineradicable doubt whether jury has been properly guided in its deliberations).

Furthermore, failure to incorporate the harmless error doctrine into appellate review of orders which implicate government officials' qualified immunity ignores a central purpose of qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court recognized the important public policy of protecting government officials from the costs of trial or the burdens of broad reaching discovery "where they have not violated a clearly established right." 457 U.S. at 817-818. This principle found procedural implementation in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), in which this Court extended appellate review to orders denying claims of qualified immunity. *Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806 (1985).

Fundamental principles of qualified immunity require the court of appeal to review the entire jury charge before stripping a public official of a verdict rendered in his favor. The court of appeals misapplied *Mitchell* in reaching the conclusion that appellate jurisdiction extends to examine only whether any "legal error" exists in the charge. Such an abbreviated examination is functionally at odds with the weighty public policy concerns which underlie *Harlow* and *Mitchell.*

The court of appeals in this case was unwilling or unable to come to grips with the clearly established rules governing the collateral order doctrine. By reserving plenary examination of the charge until after the *second* trial, assuming a verdict against Petitioners is rendered, their immunity stemming from the verdict in their favor at the first trial would not be effectively reviewable after final judgment. By that time, the very purpose of immunity--to protect petitioners from the burdens of discovery and trial--would have been irrevocably sacrificed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC*
Assistant Attorney General

GABRIEL G. QUINTANILLA
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR PETITIONER

**Counsel of Record*

CERTIFICATE OF SERVICE

I, Gabriel G. Quintanilla, Assistant Attorney General of Texas, do hereby certify that two true and correct printed and bound copies of the above and foregoing Petition for Writ of Certiorari have been served by placing the same in the United States Mail, postage prepaid, on this the _____ day of April, 1988, addressed as follows: Mr. Curtis B. Stuckey, P. 0. Box 1902, Nacogdoches, Texas 75963.

_____
GABRIEL G. QUINTANILLA
Assistant Attorney General